In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-529

HARLAN ALEXANDER BLACKBURN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on two counts of having knowingly used facilities of interstate commerce in furtherance of an illegal gambling enterprise, in violation of 18 U.S.C. 1952. He was sentenced to prison terms of four years and a fine of $4,000 on each count (Tr. 1584).[1] The court of appeals affirmed (Pet. App.).

The evidence, which showed, *inter alia,* that petitioner operated an illegal gambling business in Florida which had gross weekly intake of up to $250,000, is not in dispute. Petitioner's sole claim relates to the court's

[1] "Tr." refers to the transcript of the trial which we are lodging herewith.

refusal to require production of certain F.B.I. investigative reports regarding the government's principal witness, McCormick, who had worked with petitioner in the operation of the gambling enterprise. McCormick served as a paid informer for the F.B.I. for approximately four years. During this period McCormick was interviewed about once a month. He made oral reports to an agent, who took notes which he then reviewed with McCormick to insure accuracy; later the agent dictated written reports. McCormick never read the notes or the reports (Tr. 1001, 1016–1029).

At trial the government furnished petitioner with the two reports which pertained to this prosecution. Petitioner demanded, under the Jencks Act, 18 U.S.C. 3500, all the reports covering the entire four-year period. The district court held a hearing at which the agent who had interviewed McCormick testified that the reports were his interpretations of the interviews and that he had never quoted the witness directly except for a few trade terms used in the gambling business (Tr. 1017–1018, 1021). In addition the agent testified that in preparing the reports he had separated the information according to incident, and that only the two reports furnished petitioner contained any material relating to the direct testimony of the informant (Tr. 1020–1025).[2] McCormick in turn testified that he had given only verbal reports to the agents, that the writ-

[2] The judge also directed the prosecutor to examine the remaining reports to determine if they contained any exculpatory matter. The prosecutor did so and represented to the court that nothing in the reports was exculpatory as to petitioner (Tr. 1040–1045, 1454–1455).

ten reports were not his, and that he had never seen any of them (Tr. 1005–1006).[3]

Following the hearing, the district judge ruled that the reports were not Jencks Act material, as they had not been adopted by the witness; he therefore refused to require production of the reports (Tr. 1001, 1032–1043, 1045, 1454–1458).

The trial court's determination that the reports had not been adopted by McCormick should be sustained. Although a different result was reached in *Campbell* v. *United States*, 373 U.S. 487, this was based on the finding of adoption made by the trial judge on the particular facts of that case. As the Court in *Campbell* held, the relevant questions are factual and the findings of the district courts should not be disturbed unless clearly erroneous, 373 U.S. at 493. The finding was not clearly erroneous in this case. Furthermore, the trial court correctly found that the reports were not producible since they did not relate to the direct testimony of the witness. See *United States* v. *Graves*, 428 F. 2d 196 (C.A. 5), certiorari denied, 400 U.S. 960.

It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1971.

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[3] Petitioner's assertion that this witness did not testify on the question of adoption (Pet. 9–10) is not supported by the record.

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